No. 77-1688

In the Supreme Court of the United States

OCTOBER TERM, 1978

LE ROY SYMM, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
JOHN C. HOYLE
Attorneys
Department of Justice
Washington, D.C. 20530

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. C) is reported at 445 F. Supp. 1254.

JURISDICTION

The judgment of the three-judge district court was entered on March 3, 1978 (J.S. App. B). Notice of appeal was filed on March 27, 1978 (J.S. App. A), and the jurisdictional statement was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973bb.

QUESTION PRESENTED

Whether the means used to determine the voting eligibility of students living on a college campus in Waller County, Texas, denied the students the right to vote on an equal basis with other citizens.

STATEMENT

1. This case involves a challenge to one aspect of the voter registration practices employed in Waller County, Texas. Waller County, a small rural county west of Houston, has a population of approximately 15,000, a slight majority of which is black. Prairie View A & M University, a state-supported, predominantly black university, is located in Waller County. The dispute that gave rise to this case concerned the eligibility of students at the university to vote in Waller County on the same terms as non-students.

Appellant, the Tax Assessor-Collector of Waller County, is responsible for registering voters in the county. It is his practice ordinarily to refuse to permit unmarried students living in the dormitories of Prairie View A & M to register to vote, unless they prove to his satisfaction that they are permanent residents of the county (J.S. App. C16).

Appellant puts this practice into effect by using a special questionnaire that he has devised to determine whether students at Prairie View who attempt to register to vote have met his standards of residency in Waller County. The questionnaire, which is sent only to Prairie View students or to persons with addresses on the campus (J.S. App. C19-C20), inquires whether the prospective voter is a student, whether he intends to reside in Waller County indefinitely, what he plans to do after college, whether he has a job in Waller County, and where he lives

when college is not in session (J.S. App. C43). Very few students have succeeded in registering to vote after having been sent appellant's questionnaire. Appellant sent his questionnaire to 545 persons from Prairie View who applied to register in 1976. Only 35 were ultimately registered to vote—25 on the basis of their responses to the questionnaire, and another 10 after a hearing (J.S. App. C16-C17). In registering nonstudents in Waller County, appellant does not use his questionnaire, but instead registers voters on the basis of tax roll records and the asserted personal knowledge of appellant and his deputies regarding the prospective voter's qualifications (J.S. App. C15).[1]

2. Although appellant is responsible under Texas law for registering voters in the county (V.A.T.S. Election Code (Cum. Supp. 1977), Article 5.09a), the Secretary of State is the chief election officer of the State (*id.*, Article 1.03). The Texas Election Code provides that the Secretary of State "shall prescribe the application form" for voter registration and that the "registrar in each county shall accept any application made upon any form prescribed by the Secretary of State which supplies all the necessary information for registration" (*id.*, Article 5.13a). Included in the information that must be provided on the registration form is a statement

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[1]The district court noted that of the persons registered on the basis of asserted personal knowledge, many appeared not to know appellant and not to know how he could have knowledge of their residence. In addition, the court noted that appellant and his deputies had been unable to state, with reference to a large number of persons who had been registered on the basis of claimed personal knowledge, that they had any personal knowledge concerning the residence of those persons (J.S. App. C19).

that the applicant is a resident of the county in which he seeks to vote (*id.*, Article 5.13b(6). The Code further provides (*id.*, Article 5.02) that the Secretary of State

> shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General.

In September 1977, the Secretary of State issued a directive, entitled Emergency Rule 004.30.05.313, which prohibited registrars from using any questionnaire or requiring any additional information from an applicant who has properly completed a state voter registration application (J.S. App. C13). Appellant disregarded the Secretary of State's directive, however, and continued to use his own questionnaire, which requires additional information beyond that required on the official state registration application (J.S. App. C15 to C18). By using his special questionnaire, appellant thus continued to apply a far more stringent test for residency than is used in any of the 253 other counties in Texas, including the 70 counties that contain other institutions of higher education (J.S. App. C11-C12; see Motion to Dismiss or Affirm of the State of Texas, p. 2).[2]

Appellant has devised his questionnaire and his voter registration practices in reliance on a provision in the Texas Election Code that students are presumed not to be residents of the county where they attend college. That

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[2]Appellant began applying these more stringent standards in 1966, when a significant number of students from Prairie View A & M began to try to register to vote in Waller County (J.S. App. C14).

presumption, however, was declared invalid in *Whatley* v. *Clark*, 482 F. 2d 1230 (C.A. 5), certiorari denied, 415 U.S. 934, and the State of Texas does not rely on the presumption. Instead, the State has taken the position that students should be entitled to vote where they consider themselves to be residents, even if that is the county where they attend school rather than the county where their parents reside (Motion to Dismiss or Affirm of the State of Texas, p. 2).

In giving effect to the presumption against residency for students, appellant has taken the position (J.S. App. C16)

> that generally students are not regarded by him as residents unless they do something to qualify as permanent residents, such as marrying and living with their spouse or obtaining a promise of a job in Waller County when they complete school. He does not regard a dormitory room as a permanent residence, and regards a permanent residence, only as a place with a refrigerator, stove and furniture.[3]

3. The Attorney General filed this action on October 14, 1976, seeking injunctive and declaratory relief on the ground that appellant's voter registration practices violated 42 U.S.C. 1971(a), 1973, 1973bb, and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.[4] The State of Texas, the Texas Secretary of State, and the

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[3]Appellant has two general exceptions to his refusal to register students who live in the Prairie View dormitories. He routinely registers students whose parents live in Waller County and married students, if both live in Waller County (J.S. App. C18).

[4]This is the third suit seeking to enjoin some aspect of appellant's voter registration practices. See *Wilson* v. *Symm*, 341 F. Supp. 8 (S.D. Tex.); *Ballas* v. *Symm*, 351 F. Supp. 876 (S.D. Tex.), affirmed, 494 F. 2d 1167 (C.A. 5).

Texas Attorney General, all named as defendants, cross-claimed against appellant, asserting that Emergency Rule 004.30.05.313 prohibits the use of appellant's questionnaires. They sought an injunction prohibiting appellant from continuing to use the questionnaire contrary to the directions of that rule (J.S. App. C8). Appellant then cross-claimed against the Texas defendants, seeking a declaratory judgment that the Secretary of State had no authority under state law to issue the Emergency Rule or to prohibit his using the questionnaire. In March 1977, the three-judge district court abstained (J.S. App. F1-F22), in order to allow state law issues to be decided in state courts. The court of appeals reversed the abstention decision (J.S. App. D), and the case proceeded to trial.[5]

The district court held that appellant's practices violated both Texas law and certain federal constitutional and statutory guarantees of equal voting rights (J.S. App. C31-C38, C21-C30, C38-C41). It entered an injunction that, *inter alia*, required that college students of Waller County be permitted to register and vote "on the same basis and by application of the same standards and procedures as non-students * * *" (J.S. App. B1); prohibited appellant from applying a presumption that college students are not residents of the county in which they attend school (J.S. App. B2-B3); prohibited appellant from using his special questionnaire; and ordered him to "register students on the basis of the information contained in the state-approved registration form, as is done elsewhere in

[5]Appellant does not challenge the ruling that abstention was improper.

Texas," unless he had "tangible, recordable evidence" that a particular applicant was not a *bona fide* resident of Waller County (J.S. App. B3).[6]

ARGUMENT

The district court properly held that appellant's voter registration practices impermissibly abridged the voting rights of a large number of black students attending college in Waller County. Notwithstanding appellant's efforts to paint the issue presented in this case broadly, the issue is in fact very narrow. The decision below affects voter registration practices in only one of the 254 counties in Texas. Moreover, the court did not strike down any State or local statute or ordinance; in fact, it upheld the construction of Texas law under which the Texas Attorney General contended that appellant's voter registration practices were unlawful. Nor did the court hold that appellant would have to give any special consideration to students at Prairie View A & M in the course of voter registration. Quite the contrary, the court held that appellant must consider the Prairie View students' applications on the same basis that he considers other prospective voters' applications, and on the same basis that is provided under Texas law for considering registration applications throughout the State. Finally, appellant has now conceded that the key provision of the district court's order—the prohibition against appellant's use of the statutory presumption that students are not

[6]Because the state defendants had in effect joined the United States as plaintiffs in arguing that appellant's practices were unlawful, the court found it unnecessary to grant any relief against the Texas defendants (J.S. App. C41-C42). The court also denied the relief sought by appellant against the Texas Secretary of State and Attorney General (J.S. App. B5).

residents of the counties in which they attend college—was properly entered by the district court (J.S. 22).

1. The district court's order is based in substantial part on state law. Accordingly, even if this Court were to determine that the district court misapplied federal statutory and constitutional principles applicable to voting rights, the judgment would still be supported by an adequate and independent state ground. Cf. *Herb* v. *Pitcairn,* 324 U.S. 117; *Minnesota* v. *National Tea Co.,* 309 U.S. 551; *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487. To be sure, the state ground was set forth by a federal rather than a state court, but that ground was and is supported by the State's Attorney General and its chief election officer, and it was upheld by a local three-judge court familiar with the State's laws and practices. See *Runyon* v. *McCrary,* 427 U.S. 160, 181-182; *Bishop* v. *Wood,* 426 U.S. 341, 346 and n. 10; *Propper* v. *Clark,* 337 U.S. 472, 486-487.

Contrary to appellant's contention (J.S. 24-28), we agree with the State appellees that the decision below "reinforced the Texas law" (Motion to Dismiss or Affirm of the State of Texas, p. 8). First, under Texas law, a person is not required to prove that he intends to remain in a location permanently or for any particular length of time in order to establish residency (J.S. App. C31-C34).[7] Appellant departs from this standard by requiring students to show that they expect ro reside in Waller

[7]In *Mills* v. *Barlett,* 377 S.W. 2d 636, 637, the Texas Supreme Court wrote:

> Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue * * *.

County for a particular length of time, *i.e.,* for some period after they finish college.

Appellant's use of his special questionnaire was also contrary to Texas law because it was in direct violation of the Secretary of State's directive that no such special applications were to be used in registering voters in the State. The district court properly rejected appellant's contention that the Secretary had no authority under State law to issue that directive (J.S. App. C36-C37). As noted above, the Texas Election Code makes the Secretary of State the chief election officer of the State, with the statutory responsibility "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws" (Texas Election Code, Article 1.03). In carrying out that responsibility, the Secretary of State is instructed to "cause to be prepared and distributed to each county judge, county tax assessor-collector * * * detailed and comprehensive written directives and instructions relating to and based upon the election laws as they apply to elections * * *" (*ibid.*). Moreover, the Secretary of State is instructed to implement the state policies governing registration and voting by directive, and the State Attorney General is authorized to enforce those directives by injunction, if necessary (Texas Election Code, Article 5.02(b)). The Texas Election Code was amended in 1975 to give the Secretary of State these supervisory powers, apparently to address the problem of appellant's registration practices (see J.S. App. C36), and in response to contrary language in the opinion in *Ballas* v. *Symm, supra,* 351 F. Supp. at 888, interpreting the previous statute. Accordingly, the district court was clearly correct in holding that under state law, appellant's registration practices were improper.

2. As the district court further held, appellant's voter registration practices violate federal law as well.

A state may require that applicants be *bona fide* residents of the state or appropriate political subdivision in order to register to vote. See, *e.g., Dunn* v. *Blumstein,* 405 U.S. 330, 351; *Carrington* v. *Rash,* 380 U.S. 89, 96. But in this case, appellant has singled out a particular group—students living on the campus of Prairie View A & M University—and has placed an extra burden on them that he does not impose on non-students—one that is placed on no other prospective voters in the state. Such a practice violates the Equal Protection Clause by denying a particular group of citizens the right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein, supra,* 405 U.S. at 336; *Frazier* v. *Callicutt,* 383 F. Supp. 15 (N.D. Miss.); *Sloane* v. *Smith,* 351 F. Supp. 1299 (M.D. Pa.); *Bright* v. *Baesler,* 336 F. Supp. 527 (E.D. Ky.).[8]

The evidence overhelmingly supports the district court's finding that appellant's practices discriminated against students at Prairie View. Appellant insisted that college students and those with campus addresses complete his questionnaire; he required students to show an expectation of permanent residency in Waller County (J.S. App. C16); and he did not apply similar standards to non-students (J.S. App. C19).

The basis for these discriminatory practices, appellant admitted, was to enforce the statutory presumption against student non-residency. Yet appellant has now abandoned his objection to the portion of the injunction barring him from applying that presumption, and he has

[8]The class of citizens disfranchised by appellant's practices was, of course, distinctive not only because it was almost entirely composed of students, but also because it was largely composed of persons between the ages of 18 and 21, and because it was entirely black.

conceded that "under the present case law" (J.S. 22) that presumption is unconstitutional. Nonetheless, appellant seeks to avoid the effect of his own admission that his voter registration system was designed to implement the presumption of student non-residency (J.S. App. C14, C16) by arguing that "an examination of the facts and circumstances clarifies what Symm is actually doing, and there is much more involved than a simple presumption" (J.S. 22). The district court, however, specifically found that appellant was applying the presumption (J.S. App. C14, C19-C20), and appellant's effort to put a different face on his conduct is contrary to the district court's well supported findings. As the court of appeals held in *Whatley* v. *Clark, supra,* and as appellant now apparently concedes, the presumption of student non-residency serves no compelling governmental interest.[9] Appellant's practices thus cannot survive the careful and meticulous scrutiny to which exclusionary voting practices must be subjected under the Equal Protection Clause, *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621, 626; see also *Evans* v. *Cornman,* 398 U.S. 419, 422; *Williams* v. *Rhodes,* 393 U.S. 23, 31.[10] Moreover, since appellant's

[9]Other courts have similarly concluded that presumptions of student non-residency do not further compelling governmental interests and thus do not satisfy the demands of the Equal Protection Clause. See *Shivelhood* v. *Davis,* 336 F. Supp. 1111 (D. Vt.); *Wilkins* v. *Bentley,* 385 Mich. 670, 189 N.W. 2d 423; *Worden* v. *Mercer County Board of Elections,* 61 N.J. 325, 294 A. 2d 233.

[10]Appellant's contention (J.S. 6) that no one is denied the right to vote, but that certain persons are merely required to vote elsewhere does not lessen the discriminatory nature of appellant's practices. *Carrington* v. *Rash, supra*; *Evans* v. *Cornman, supra.* The County, like the State itself, is constitutionally obligated to afford equal protection of the laws "within its borders * * *." *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351. See also, *Gomillion* v. *Lightfoot,* 364 U.S. 339, 349 (Whittaker, J., concurring) (segregation of citizens by race into separate voting jurisdictions violates the Equal Protection Clause of the Fourteenth Amendment).

practices were directed at a group having a high concentration of persons in the 18 to 21 age group (see J.S. App. C11), those practices offend interests implicated by the Twenty-Sixth Amendment as well as the Equal Protection Clause. See *Worden* v. *Mercer County Board of Elections, supra.* Fifteenth Amendment interests also are implicated, since the group subjected to disparate treatment is racially defined. Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339.

Appellant's practices also violate 42 U.S.C. 1971(a)(2)(A), the statutory guarantee of equal voting rights. That statute provides that no state or local official may "apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish or similar political subdivision who have been found by State officials to be qualified to vote." The district court's finding that appellant applied a different standard for determining residency to the students at Prairie View from the standard applied to other Waller County citizens falls directly within the prohibition of this provision. The language and legislative history of the statute indicate that discrimination on nonracial as well as racial grounds is prohibited. See Guido, *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment,* 47 N.Y.U. L. Rev. 32, 53-57 (1972). In this case, however, a violation of the statute is established under either construction, since all the persons subjected to appellant's questionnaire procedure were black. See *Frazier* v. *Callicut,* 383 F. Supp. 15 (N.D. Miss.).

4. Finally, appellant argues (J.S. 32-42) that this case should have been governed by the decisions in his favor in

the two previous challenges to his voter registration practices, *Wilson* v. *Symm, supra,* and *Ballas* v. *Symm, supra.* As the district court observed, however, those cases are not controlling here. In *Wilson,* the district court held that appellant's use of his questionnaire was a reasonable means of enforcing the statutory presumption of student non-residency in Article 5.08(k) of the Texas Election Code. After the decision, the Fifth Circuit held the presumption invalid in *Whatley* v. *Clark, supra,* thus depriving the *Wilson* case of any precedential value. In *Ballas,* the court held simply that the use of a questionnaire to determine residency did not violate the Constitution, in light of the court's finding that there was no proof that the questionnaire was used as a device to prevent legal residents from voting.

Since the government was not in privity with the private plaintiffs in either *Wilson* or *Ballas,* those decisions are not binding on the United States, which has independent authority to sue to prohibit violations of individuals' civil rights. Cf. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
JOHN C. HOYLE
Attorneys

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